

MONTANA LEGISLATIVE HISTORY

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Chapter 589 19 83

Bill H 92 S \_\_\_\_\_ Original bill & history C

H. Committee on State Administration

Hearing Date(s) Jan 10 ✓ C

\_\_\_\_\_ C

\_\_\_\_\_ C

\_\_\_\_\_ C

Date Out Jan 10 ✓ C

S. Committee on State Administration

Hearing Date(s) Mar 01 \_\_\_\_\_ C

Mar 02 \_\_\_\_\_ C

\_\_\_\_\_ C

\_\_\_\_\_ C

Mar 02 ✓ C

Did this bill originate in an interim committee? \_\_\_\_\_ Yes \_\_\_\_\_ No

Committee \_\_\_\_\_

Report \_\_\_\_\_

TRANSMITTED TO GOVERNOR: 2/17/83  
SIGNED: 2/21/83, CHAPTER 32

HB 92 -- STOBIE, DAILY, SCHULTZ, ET AL. -- TO AUTHORIZE THE ADMINISTRATIVE CODE COMMITTEE TO OBJECT TO ANY RULE UPON THE GROUND THAT IT WAS ADOPTED IN SUBSTANTIAL VIOLATION OF THE PROCEDURAL OR SUBSTANTIVE AUTHORITY DELEGATED TO THE AGENCY, REQUIRING THE AGENCY, AFTER OBJECTION BY THE COMMITTEE, TO PROVE THE LAWFULNESS OF THE RULE; AWARDING COSTS AND ATTORNEY FEES AGAINST THE AGENCY IF THE RULE IS INVALIDATED BY COURT JUDGMENT; AMENDING SECTION ....

BY REQUEST OF: THE ADMINISTRATIVE CODE COMMITTEE

INTRODUCED: 01/05/83  
REFERRED TO COMMITTEE ON STATE ADMINISTRATION: 01/05/83  
HEARING: 1/10/83  
REPORT: 01/11/83, DO PASS  
2ND READING: 01/14/83, DO PASS AYES: 82; NAYS: 10  
3RD READING: 01/17/83, DO PASS AYES: 78; NAYS: 20

TRANSMITTED TO SENATE: 1/17/83  
REFERRED TO COMMITTEE ON STATE ADMINISTRATION: 01/18/83  
HEARING: 3/1/83  
REPORT: 3/2/83, BE CONCURRED IN, AS AMENDED  
2ND READING: 03/04/83 AYES: 47; NAYS: 0  
3RD READING: 03/07/83 AYES: 47; NAYS: 0

REFERRED TO HOUSE WITH AMENDMENTS: 3/7/83  
2ND READING: 03/09/83, BE CONCURRED IN AYES: 83; NAYS: 11  
3RD READING: 03/10/83, BE CONCURRED IN AYES: 91; NAYS: 6

TRANSMITTED TO GOVERNOR: 03/15/83  
RETURNED WITH AMENDMENTS: 3/19/83

HOUSE  
2ND READING: 03/31/83, BE NOT ADOPTED AYES: 92; NAYS: 0  
2ND READING: 04/04/83, BE ADOPTED AYES: 87; NAYS: 3  
3RD READING: 4/5/83, BE ADOPTED AYES: 97; NAYS: 2

TRANSMITTED TO SENATE: 04/05/83  
2ND READING: 04/07/83, BE ADOPTED AYES: 50; NAYS: 0  
3RD READING: 04/08/83, BE ADOPTED AYES: 47; NAYS: 1

RETURNED TO HOUSE: 4/8/83

TRANSMITTED TO GOVERNOR: 04/15/83  
SIGNED: 04/19/83, CHAPTER 589

HB 93 -- DONALDSON, SAUNDERS CURTISS -- TO ALLOW AN ELEMENTARY SCHOOL THAT ANTICIPATES AN ANB OF AT LEAST 14 BUT LESS THAN 18 PUPILS TO APPLY FOR TWO-TEACHER FUNDING AND TO RECEIVE AN APPROPRIATE MAXIMUM GENERAL FUND BUDGET AMOUNT; AMENDING SECTIONS ....

INTRODUCED: 01/05/83  
REFERRED TO COMMITTEE ON EDUCATION & CULTURAL RESOURCES: 01/05/83  
HEARING: 1/17/83  
REPORT: 01/20/83, DO NOT PASS, AS AMENDED  
REREFERRED TO COMMITTEE ON EDUCATION & CULTURAL RESOURCES: 01/21/83  
REPORT: 02/16/83, DO PASS, AS AMENDED  
2ND READING: 02/18/83, DO PASS AYES: 87; NAYS: 10

Representative Harper said yes. Chairman Brand asked how the balance of power would be affected. Nachtsheim said that historically there has been no one group in control.

REPRESENTATIVE O'CONNELL MOVED the bill be deferred until other proponents and opponents are present.

Representative Bardanoue noted that it is unusual to have an even-numbered board.

Representative McBride suggested the Committee act on Representative O'Connell's MOTION, and the committee deferred the bill to a later, unspecified time.

CHAIRMAN BRAND CLOSED THE HEARING ON HOUSE BILL 78, SUBJECT TO RESUMING AT A LATER TIME.

#### HOUSE BILL 92

CHAIRMAN BRAND OPENED THE HEARING ON HOUSE BILL 92 BY CALLING ON ONE OF ITS SPONSORS, REPRESENTATIVE HAL HARPER.

Representative Harper explained that HOUSE BILL 92 would provide a means for the Administrative Code Committee to object to a proposed administrative rule or regulation, and if the agency did not make desired changes in the matter, the Committee's objection would be printed in the Montana Administrative Register and the Administrative Rules of Montana (ARM).

THERE BEING NO OTHER PROPONENTS PRESENT, CHAIRMAN BRAND OPENED THE HEARING TO QUESTIONS BY THE COMMITTEE.

REPRESENTATIVE MUELLER asked Legislative Council Attorney David Niss to explain the legal standard contemplated by the bill.

DAVID NISS said the substantial compliance standard has been in effect within the Montana Administrative Procedures Act since 1977, and the courts are comfortable with that term. He said it "gives a push" to private parties who challenge rules in court. He said it would shift the burden of proof from the plaintiff in such a lawsuit to the respondent agency, forcing the agency to show that the rule or regulation was justified. "It would allow the Committee to do more than advise," Niss said. It is not the power to repeal, he said, but it gives legal effect to the Committee's judgment.

Representative Mueller said it would open the state up to a lawsuit, and asked Niss if in his judgment it would do so.

Niss said such a determination would be hard to make. He said that would depend on the agencies, how they make rules, and how the Administrative Code Committee reacts to the rules. So far, he said, there hasn't been much opposition to rules on the level of mounting court challenges. He said there is no question that it will in some way encourage lawsuits, but it would be hard to say how many. He said it gives plaintiffs a boost.

Chairman Brand asked how many suits have been filed. Niss said he had no count, because that would require a survey of the 56 county clerks of court.

Representative McBride asked if at present, could the Code Committee object? Niss said it does not, because the only place an objection would be noted is in the minutes of the Committee and in a letter to the agency. "The Committee's authority is totally advisory," he said. At present, there is no regulation or authority to ask the Secretary of State to publish an objection, as this bill would do.

Chairman Brand asked Dan Smilie (see attached written statement) if he thought that suits would be brought because of the bill, if it is signed into law.

DAN SMILIE said the current statute has a standard of "arbitrary and capricious" for judicial review. Effects of a different standard, he said, would be fleshed out by case law. Smilie called it "dangerous and unconstitutional" to give a legislative committee veto power over an administrative agency. "That's what we have the judiciary for," Smilie said. He said the administrative agencies pay attention to the wishes of the Legislature, and the bill, if passed, "is going to cost us a lot of money." "It's a neon sign that says, 'Please sue these folks,'" Smilie said.

Representative Pistoria asked for an explanation of page 1, line 15 of the bill. "Where is the new section?" he asked. Niss was called on to answer, and handed out copies of two sections of the existing law (see attached handout from Niss). Niss said the current standard of "substantial compliance" already exists in the law. "This bill would take the same standard and apply a different procedure for that standard in judging validity of rules," he said. The first section would allow the Committee to object to agencies when they go to the Secretary of State. Objection would be by letter. After the letter is received, the agency has 14 days to respond to the Committee in writing. After the agency response, the Committee may drop its objection or revise its objection. The Committee would have two meetings, he said: one to send an objection and one to receive and consider the response. At the second meeting, the

Committee votes whether to forward the objection to the Secretary of State to have it published in the Administrative Register (if time permits) and in the Administrative Rules of Montana (ARM). Publication would be adjacent to the offensive rule.

Once the administrative rule and the objection is published, the burden shifts to the agency to justify the rule in court if a challenge is brought. Niss said the bill was written substantially from the Model State Administrative Procedure Act. Niss read from the "Administrative Code Committee Biennial Report to the 48th Legislature, December 1982," page 77 of Appendix C.

REPRESENTATIVE DRISCOLL asked if the bill becomes law, would that result in more or fewer rules. Representative Harper said it would have no effect as such, but it would provide an effect once a bill is challenged.

THERE BEING NO FURTHER QUESTIONS FROM THE COMMITTEE, CHAIRMAN BRAND CLOSED THE HEARING ON HOUSE BILL 92.

#### HOUSE BILL 57

CHAIRMAN BRAND INTRODUCED BOB JOHNSON OF THE TEACHERS' RETIREMENT SYSTEM, TO ANSWER QUESTIONS ABOUT HOUSE BILL 57, WHICH WAS DISCUSSED IN THE PREVIOUS MEETING, FRIDAY, JANUARY 7, 1983.

Responding to questions from the Committee, Johnson said that in 1981 when a similar bill for the Teachers' Retirement System went into effect, the system had 23 teachers who earlier had purchased into the system and who therefore, got refunds of their payments under terms of the bill. "They got money back from us," Johnson said. The refunds were funded by increased employer contributions, not appropriations from the general fund. Prior to the legislation, he said, members who wanted the time in question to count, paid an amount equal to their own contributions plus the employer's contribution. Johnson said it cost each member who "purchased in" about \$5,000. He said the members had an average service time of about 2.5 years to pay for. He said about 300 members purchased in, compared to a system membership of about 14,000. He said he received no adverse comment from employers, who were school boards. "They are content with it," he said.

Responding to a question from Representative McBride, Johnson said the employer's levy was increased by three-hundredths of 1 percent.

Responding to a question from Representative Driscoll, Johnson said there is no limit for members who have low incomes.

HOUSE BILL 67

Chairman Brand called for action on HOUSE BILL 67. Representative Sales MOVED, Representative Pistoria seconded, to amend lines 20 and 21 to add an effective date on passage and approval.

Representative McBride asked if this bill would affect other administrative rules. Representative Bardanouve said he believed there would be no conflict. Responding to an inquiry by Representative McBride, Niss suggested the Legislature might wish to amend the present joint resolution to allow this bill.

The question was called and the Committee approved the motion by unanimous voice vote. Chairman Brand asked that the motion be regarded as also including a change in the title to conform to bill-drafting requirements. The Committee approved such understanding by unanimous voice vote.

Representative Phillips MOVED. Representative Sales seconded, that HOUSE BILL 67 DO PASS. The Committee approved the motion by unanimous voice vote.

HOUSE BILL 78

Chairman Brand called for action on HOUSE BILL 78. Representative O'Connell MOVED. REPRESENTATIVE HAMMOND seconded, that HOUSE BILL 78 be deferred to a later date. The Committee approved the motion by unanimous voice vote.

HOUSE BILL 92

Chairman Brand called for action on HOUSE BILL 92. Representative Sales MOVED. Representative Phillips seconded, that the bill be recommended DO PASS.

Representative Bardanouve called the bill the Lawyer's Relief Bill.

The Committee approved the motion by voice vote. Representatives Bardanouve and Pistoria cast "no" votes.

Representative O'Connell MOVED for adjournment, which was approved by unanimous voice vote.

  
\_\_\_\_\_  
REPRESENTATIVE JOE BRAND, Chairman

# STANDING COMMITTEE REPORT

JANUARY 10,

33

19.....

MR. SPEAKER

We, your committee on STATE ADMINISTRATION

having had under consideration HOUSE Bill No. 92

first reading copy (white)

"AN ACT TO AUTHORIZE THE ADMINISTRATIVE CODE COMMITTEE TO OBJECT TO ANY RULE UPON THE GROUND THAT IT WAS ADOPTED IN SUBSTANTIAL VIOLATION OF THE PROCEDURAL OR SUBSTANTIVE AUTHORITY DELEGATED TO THE AGENCY; REQUIRING THE AGENCY, AFTER OBJECTION BY THE COMMITTEE, TO PROVE THE LAWFULNESS OF THE RULE; AWARDING COSTS AND ATTORNEY FEES AGAINST THE AGENCY IF THE RULE IS INVALIDATED BY COURT JUDGMENT; AMENDING SECTION 2-4-506, MCA."

Respectfully report as follows: That HOUSE Bill No. 92

DO PASS

WITNESS STATEMENT

NAME DAL. Smilie BILL No. HB 92  
ADDRESS 1127 5<sup>th</sup> Ave Helena DATE 1/10/93  
WHOM DO YOU REPRESENT SPS  
SUPPORT \_\_\_\_\_ OPPOSE ☒ AMEND \_\_\_\_\_

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:



DEPARTMENT OF  
SOCIAL AND REHABILITATION SERVICES



TED SCHWINDEN, GOVERNOR

P.O. BOX 4210

STATE OF MONTANA

HELENA, MONTANA 59604

January 11, 1983

To: House Committee on State Administration  
From: Dal Smilie, SRS *DS*  
Re: HB 92

SRS must oppose HB 92. Section 2-4-506, MCA currently allows the Administrative Code Committee to object to an agency rule that was adopted with arbitrary or capricious disregard of authority. Such an objection by the Committee put the burden of proof on the agency to show the rule was not adopted with an arbitrary and capricious disregard of authority.

HB 92 goes farther and provides a functional veto of proposed or current administrative rules by a standing legislative committee. HB 92 provides that notice of the Committee's objections be placed in the ARM beside the rule. That notice by the Committee is notice that a lawsuit is proper and will, in the Committee's mind be successful.

The executive branch agencies are usually more than willing to comply with requests by the Code Committee to modify rules on technical legal grounds. In those cases where there is disagreement on legal grounds it does not best serve state interests to invite the public at large to sue the state.

DS/rr

rule may be effective for a period not longer than 120 days, but the adoption of an identical rule under 2-4-302 is not precluded.

(2) The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review.

History: En. Sec. 4, Ch. 2, Ex. L. 1971; amd. Sec. 5, Ch. 410, L. 1975; amd. Sec. 1, Ch. 482, L. 1975; amd. Sec. 8, Ch. 285, L. 1977; R.C.M. 1947, 82-4204(2); amd. Sec. 5, Ch. 243, L. 1979.

**2-4-304. Informal conferences and committees.** (1) An agency may use informal conferences and consultations as a means of obtaining the viewpoints and advice of interested persons with respect to contemplated rulemaking.

(2) An agency may also appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rulemaking. The powers of the committees shall be advisory only.

(3) Nothing herein shall relieve the agency from following rulemaking procedures required by this chapter.

History: En. Sec. 4, Ch. 2, Ex. L. 1971; amd. Sec. 5, Ch. 410, L. 1975; amd. Sec. 1, Ch. 482, L. 1975; amd. Sec. 8, Ch. 285, L. 1977; R.C.M. 1947, 82-4204(4).

**2-4-305. Requisites for validity — authority and statement of reasons.** (1) The agency shall consider fully written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption. If substantial differences exist between the rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule as that rule is printed in the Montana administrative register, the differences must be described in the statement of reasons for and against agency action. When no written or oral submissions have been received, an agency may omit the statement of reasons.

(2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting the language, the reference shall clearly indicate that portion of the language which is statutory and the portion which is amplification of the language.

(3) Each proposed and adopted rule shall include a citation to the specific grant of rulemaking authority pursuant to which it or any part thereof is adopted. In addition, each proposed and adopted rule shall include a citation to the specific section or sections in the Montana Code Annotated which the rule purports to implement.

(4) Each rule proposed and adopted by an agency implementing a policy of a governing board or commission must include a citation to and description of the policy implemented. Each agency rule implementing a policy, as used in the definition set forth in 2-4-102(10), and the policy itself must be based on legal authority and otherwise comply with the requisites for validity of rules established by this chapter.

(5) To be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

(6) Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, no rule adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

(7) No rule is valid unless adopted in substantial compliance with 2-4-302 or 2-4-303 and this section and unless notice of adoption thereof is published within 6 months of the publishing of notice of the proposed rule. If an amended or supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit must be determined with reference to the latest notice in all cases.

*History:* Ap.p. Sec. 4, Ch. 2, Ex. L. 1971; amd. Sec. 5, Ch. 410, L. 1975; amd. Sec. 1, Ch. 482, L. 1975; amd. Sec. 8, Ch. 285, L. 1977; Sec. 82-4204, R.C.M. 1947; Ap.p. 82-4204.1 by Sec. 9, Ch. 285, L. 1977; Sec. 82-4204.1, R.C.M. 1947; R.C.M. 1947, 82-4204(part), 82-4204.1(part); amd. Sec. 6, Ch. 243, L. 1979; amd. Sec. 2, Ch. 381, L. 1981.

#### **Compiler's Comments**

*1981 Amendment:* Inserted the provision relating to substantial differences between the proposed and adopted rule, which must be described in an agency's statement of reasons, in (1); inserted "proposed and adopted" before

"rule" in two places in (3); added subsection (4); added the last sentence concerning the 6-month limit as to notice to (7).

*Severability:* Section 8, Ch. 381, L. 1981, was a severability section.

**2-4-306. Filing, format, and effective date — dissemination of emergency rules.** (1) Each agency shall file with the secretary of state a copy of each rule adopted by it.

(2) The secretary of state may prescribe a format, style, and arrangement for notices and rules which are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that is not in compliance therewith. He shall keep and maintain a permanent register of all notices and rules filed, including superseded and repealed rules, which shall be open to public inspection and shall provide copies of any notice or rule upon request of any person. Unless otherwise provided by statute, the secretary of state may require the payment of the cost of providing such copies.

(3) In the event that the administrative code committee has conducted a poll of the legislature in accordance with 2-4-403 or the revenue oversight committee has conducted a poll in accordance with 5-18-109, the results of the poll shall be published with the rule.

(4) Each rule shall become effective after publication in the register as provided in 2-4-312, except that:

(a) if a later date is required by statute or specified in the rule, the later date shall be the effective date;

(b) subject to applicable constitutional or statutory provisions, an emergency rule shall become effective immediately upon filing with the secretary of state or at a stated date following publication in the register if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to every person who may be affected by them.

*History:* En. Sec. 5, Ch. 2, Ex. L. 1971; amd. Sec. 10, Ch. 285, L. 1977; amd. Sec. 2, Ch. 561, L. 1977; R.C.M. 1947, 82-4205(part); amd. Sec. 7, Ch. 243, L. 1979; amd. Sec. 12, Ch. 268, L. 1979.

## VISITORS' REGISTER

HOUSE

COMMITTEE

BILL HB 92

Date \_\_\_\_\_

SPONSOR \_\_\_\_\_

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

House BILL NO. 92

INTRODUCED BY *Stobie* *Harley Schutt* *Harper*  
BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT TO AUTHORIZE THE ADMINISTRATIVE CODE COMMITTEE TO OBJECT TO ANY RULE UPON THE GROUND THAT IT WAS ADOPTED IN SUBSTANTIAL VIOLATION OF THE PROCEDURAL OR SUBSTANTIVE AUTHORITY DELEGATED TO THE AGENCY; REQUIRING THE AGENCY, AFTER OBJECTION BY THE COMMITTEE, TO PROVE THE LAWFULNESS OF THE RULE; AWARDING COSTS AND ATTORNEY FEES AGAINST THE AGENCY IF THE RULE IS INVALIDATED BY COURT JUDGMENT; AMENDING SECTION 2-4-506, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Committee objection to violation of authority for rule — effect. (1) If the administrative code committee objects to all or some portion of a proposed or adopted rule because the committee considers it not to have been proposed or adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, the committee shall send a written objection to the agency which promulgated the rule. The objection must contain a concise statement of the committee's reasons for its action.

(2) Within 14 days after the mailing of a committee objection to a rule, the agency promulgating the rule shall

respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

(3) If the committee fails to withdraw or substantially modify its objection to a rule, it may vote to send the objection to the secretary of state, who shall, upon receipt thereof, publish the objection in the Montana Administrative Register adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule. Costs of publication of the objection shall be borne by the committee.

(4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed to meet its burden of proof imposed by this subsection, the court shall award costs and reasonable attorney fees against the agency.

Section 2. Section 2-4-506, MCA, is amended to read:

"2-4-506. Declaratory judgments on validity or application of rules. (1) A rule may be declared invalid or inapplicable in an action for declaratory judgment if it is

HB 92

found that the rule or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff.

(2) A rule may also be declared invalid in such an action on the grounds that the rule was ~~not~~ adopted with--an arbitrary--or--capricious--disregard--for--the--purpose--of authorizing--statutes--as--evidenced--by--documented--legislative intent in substantial compliance with 2-4-302, 2-4-303, and 2-4-305.

~~{3}--If the administrative code committee has--objected to--the--adoption--or--amendment--of--a--rule--on--the--grounds--set forth--in--subsection--(2)--the--agency--bears--the--burden--in--any action--brought--under--this--section--of--proving--that--its--rule was--not--adopted--with--an--arbitrary--or--capricious--disregard for--the--purpose--of--the--authorizing--statutes~~

~~{4}{1}~~ A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

~~{5}{1}~~ The action may be brought in the district court for the county in which the plaintiff resides or has his principal place of business or in which the agency maintains its principal office. The agency shall be made a party to the action."

NEW SECTION. Section 3. Codification Instruction.

Section 1 is intended to be codified as an integral part of

Title 2, chapter 4, part 4, and the provisions of Title 2, chapter 4, apply to section 1.

-End-

STATE OF MONTANA

REQUEST NO. 055-83

FISCAL NOTE

Form BD-15

In compliance with a written request received January 6, , 19 83 , there is hereby submitted a Fiscal Note for House Bill 92 pursuant to Title 5, Chapter 4, Part 2 of the Montana Code Annotated (MCA).

Background information used in developing this Fiscal Note is available from the Office of Budget and Program Planning, to members of the Legislature upon request.

DESCRIPTION OF PROPOSED LEGISLATION:

House Bill 92 gives the Administrative Code Committee the authority to object to rules proposed or adopted in violation of the requirements of the Administrative Procedure Act, and places upon the promulgating agency, the burden of proof, in any subsequent legal challenge to the rule, to prove that the rule was in fact adopted in compliance with the act.

ASSUMPTIONS:

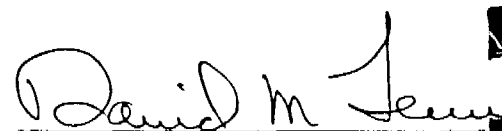
The fiscal impact of HB 92 depends upon:

- 1) The number of rules objected to by the committee;
- 2) The response of agencies to committee objections and committee responses thereto;
- 3) The number of law suits brought challenging administrative rules objected to by the committee;
- 4) The holding of the Court; and
- 5) The substance of the rule.

FISCAL IMPACT:

Impossible to determine.

FISCAL1:X/1



BUDGET DIRECTOR

Office of Budget and Program Planning

Date: 1-7-83

STATE ADMINISTRATION

March 1, 1983

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REPRESENTATIVE STOBIE said it would be up to the governing body to give it to whom they decide.

SENATOR TOWE pointed out the second section that says, "the secretary of state, each county in the state, and the librarians for the state law library.." and what he is worried about is that it will get somewhere where it would not be available to the public.

REPRESNATIVE STOBIE said he did not think that was a concern.

BOB MC CUE said that it is rarely used now in the Clerk of Courts office. The Clerk and Records office will probably keep theirs but the important thing is that they are not updating them and when the public comes in and uses them they are not using updated material.

The hearing closed on H.B.36.

CONSIDERATION OF HOUSE BILL 92:

"AN ACT TO AUTHORIZE THE ADMINISTRATIVE CODE COMMITTEE TO OBJECT TO ANY RULE UPON THE GROUND THAT IT WAS ADOPTED IN SUBSTANTIAL VIOLATION OF THE PROCEDURAL OR SUBSTANTIVE AUTHORITY DELEGATED TO THE AGENCY; REQUIRING THE AGENCY, AFTER OBJECTION BY THE COMMITTEE, TO PROVE THE LAWFULNESS OF THE RULE; AWARDING COSTS AND ATTORNEY FEES AGAINST THE AGENCY IF THE RULE IS INVALIDATED BY COURT JUDGMENT; AMENDING SECTION 2-4-506, MCA."

REPRESENTATIVE STOBIE, District 23, introduced this bill by saying that it is a codes committee request which gives the committee the authority to object on a rule they think is unlawful. Under this law a two part procedure is used to give an objection a legal affect, one the committee votes whether or not to object to a rule and send a written letter of objection to the agency then the agency has 14 days to respond to that, and if they do and the committee does not withdraw its objection they have a second codes committee meeting where they may vote to send their objections to the Secretary of State for publication in the register. It is the publication of objection that shifts the burden of proof to the agency to prove validation. The committee cannot make that judgement. This is only a challange and it goes to court for the decision

PROPONENTS: None

OPPONENTS:

Mona Jamison, legal council for the Governor's office testified.



She stated that with the publication, whenever anyone looks at it it is like a red flag. With every rule that regulates there are regularities, there are people that are going to be bound by the rules and requirements. We must believe that the rules are adopted in good faith but someone will pick-up the red flag, under this bill, and go running off to court, then it will be the agency's responsibility of burden of proof. This will cause agency time, court time and money as well as legal consideration.

Subsection 1 allows the committee to determine and this gives them the rule of authority.

DAL SMILIE, representing SRS, said that H.B.93 changes the test, the one that the attorneys tell us that we are doing in their mind. He said that on page three, line 7 it strikes evidenced by documented legislative intent and he said he is not sure the legislature would want this. He stated that burden of proof is crucial. See EXHIBIT 6 and 7.

SCOTT CURRY representing Labor and Industry said he also agrees with Dal Smilie. He said the decision making authority does belong to the courts. They are also affecting the decisions that the administrative codes committee may be making that affect the substantial rights and responsibilities of parties, not only government agencies but private parties with no repeal.

REPRESENTATIVE STOBIE closed by saying that their intention is to put up a red flag to the public. He stated that he believes the committee does act in a responsible way but they will be more careful. He stated they did not think this up it was part of the national conference of commissioners on uniform state laws, and Montana has three commissioners on that staff, Diana Dowling, Robert Sullivan and former Senator Steve Brown

#### QUESTIONS OF THE COMMITTEE:

SENATOR MARBUT asked Mona Jamison about her statement that implied that the only ones that acted in good faith was the agencies and not the committee.

MONA JAMISON said that she did not intend it to sound that way.

SENATOR MARBUT asked if she didn't think this would establish a good dialogue between the agencies and the administrative code committee.

STATE ADMINISTRATION  
March 1, 1983  
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MONA JAMISON said that she did not think that this bill does that.

SENATOR TOWE said that he believes that if the committee says something is outside the scope of the agency's authority everyone ought to know about it.

DAVID NESS spoke to the current standards and submitted EXHIBIT 8.

EXHIBIT 9 was also presented as testimony.

SENATOR TOWE mentioned the language duplication that is in the statutes on page 3, lines 12 thru 15, and asked if it is constitutional. If you have a constitutional problem it seems that it is in subsection 4 on page 2.

MONA JAMISON said that that point is well taken and there is no way they can see everything.

SENATOR HAMMOND stated that when he was home the people were concerned about regulations but did not seem there was anyway they could head it off. If an agency writes a rule they should be responsible.

There was no further business and the meeting closed at 11:55 a.m.

  
\_\_\_\_\_  
CHAIRMAN, Senator Pete Story

•

COMMITTEE

Date 3/1/83

SENATE  
SEAT 4

[illegible]

Each day attach 60 minutes.

DATE March 1, 1983

COMMITTEE ON

## VISITORS' REGISTER

| NAME                  | REPRESENTING   | BILL #                           | Check One    |              |
|-----------------------|----------------|----------------------------------|--------------|--------------|
|                       |                |                                  | Support      | Oppose       |
| Jon Meredith          | DOR            | 35492                            |              | ✓            |
| Jon Meredith          | DOR            | 37                               | ✓            |              |
| <del>DAK Smilie</del> | <del>SRS</del> | <del>37</del>                    | <del>✓</del> |              |
| <del>DAK Smilie</del> | <del>SRS</del> | <del>3592</del><br><del>47</del> |              | <del>✓</del> |
| Bob Milne             | Sec of State   | 35,36,97<br>37,46,47             |              |              |
| By Bruce              | 1st of Montana | HB 92                            |              | ✓            |
| Mona Jamison          | GOV'S OFFICE   | HB 92<br>46,47                   | ✓(47)        | ✓<br>42,46   |

(Please leave prepared statement with Secretary)



TED SCHWINDEN, GOVERNOR

P.O. BOX 4210

## STATE OF MONTANA

HELENA, MONTANA 59604

February 28, 1983

To: Senate Committee on State Administration

From: Dal Smilie, SRS

Re: HB 92

SRS must oppose HB 92. Section 2-4-506(3), MCA currently allows the Administrative Code Committee to object to an agency rule that was adopted with arbitrary or capricious disregard of authority. Once the Administrative Code Committee has so objected the burden falls on the agency to prove that the rule was not arbitrarily or capriciously adopted in disregard of authority.

HB 92 changes the current criteria for rule adoption from "arbitrary or capricious" to "in substantial compliance". This bill goes further in that it does away with proofs of legislative intent based on documented legislative intent. Under HB 92 the agencies will have a much higher standard of proof and the proofs allowable will not be based on documented legislative intent. The legislature surely cannot want courts to base decisions on legislative intent on anything less than documented intent.

Besides changing the test for rulemaking to a much higher standard HB 92 provides that the notice of the Code Committee objections be printed in the ARM. Such notice by the Committee is notice that a lawsuit is invited. The notice element provides a functional veto of administrative rules by a standing legislative committee. The decision of one committee can override the intent of the legislature as a whole, such a power is clearly unconstitutional.

DS/rr

rule may be effective for a period not longer than 120 days, but the adoption of an identical rule under 2-4-302 is not precluded.

(2) The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review.

History: En. Sec. 4, Ch. 2, Ex. L. 1971; amd. Sec. 5, Ch. 410, L. 1975; amd. Sec. 1, Ch. 482, L. 1975; amd. Sec. 8, Ch. 285, L. 1977; R.C.M. 1947, 82-4204(2); amd. Sec. 5, Ch. 243, L. 1979.

**2-4-304. Informal conferences and committees.** (1) An agency may use informal conferences and consultations as a means of obtaining the viewpoints and advice of interested persons with respect to contemplated rulemaking.

(2) An agency may also appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rulemaking. The powers of the committees shall be advisory only.

(3) Nothing herein shall relieve the agency from following rulemaking procedures required by this chapter.

History: En. Sec. 4, Ch. 2, Ex. L. 1971; amd. Sec. 5, Ch. 410, L. 1975; amd. Sec. 1, Ch. 482, L. 1975; amd. Sec. 8, Ch. 285, L. 1977; R.C.M. 1947, 82-4204(4).

**2-4-305. Requisites for validity — authority and statement of reasons.** (1) The agency shall consider fully written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption. If substantial differences exist between the rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule as that rule is printed in the Montana administrative register, the differences must be described in the statement of reasons for and against agency action. When no written or oral submissions have been received, an agency may omit the statement of reasons.

(2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting the language, the reference shall clearly indicate that portion of the language which is statutory and the portion which is amplification of the language.

(3) Each proposed and adopted rule shall include a citation to the specific grant of rulemaking authority pursuant to which it or any part thereof is adopted. In addition, each proposed and adopted rule shall include a citation to the specific section or sections in the Montana Code Annotated which the rule purports to implement.

(4) Each rule proposed and adopted by an agency implementing a policy of a governing board or commission must include a citation to and description of the policy implemented. Each agency rule implementing a policy, as used in the definition set forth in 2-4-102(10), and the policy itself must be based on legal authority and otherwise comply with the requisites for validity of rules established by this chapter.

(5) To be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

ADMINISTRATIVE PROCEDURE ACT

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(6) Whenever by the express or implied terms of any statute a state or otherwise carry out the provisions of the statute, no rule adopted is validly necessary to effectuate the purpose of the statute.

(7) No rule is valid unless adopted in substantial compliance with 2-4-302 or 2-4-303 and this section and unless notice of adoption thereof is published within 6 months of the publishing of notice of the proposed rule. If an amended or supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit must be determined with reference to the latest notice in all cases.

History: App. Sec. 4, Ch. 2, Ex. L. 1971; amd. Sec. 5, Ch. 410, L. 1975; amd. Sec. 1, Ch. 482, L. 1975; amd. Sec. 8, Ch. 285, L. 1977; Sec. 82-4204, R.C.M. 1947; Ap.p. 82-4204.1 by Sec. 9, Ch. 285, L. 1977; Sec. 82-4204.1, R.C.M. 1947; R.C.M. 1947, 82-4204(part), 82-4204.1(part); amd. Sec. 6, Ch. 243, L. 1979; amd. Sec. 2, Ch. 381, L. 1981.

Compiler's Comments

1981 Amendment: Inserted the provision relating to substantial differences between the proposed and adopted rule, which must be described in an agency's statement of reasons, in (1); inserted "proposed and adopted" before

"rule" in two places in (3); added subsection (4); added the last sentence concerning the 6-month limit as to notice to (7).  
Severability: Section 8, Ch. 381, L. 1981, was a severability section.

**2-4-306. Filing, format, and effective date — dissemination of emergency rules.** (1) Each agency shall file with the secretary of state a copy of each rule adopted by it.

(2) The secretary of state may prescribe a format, style, and arrangement for notices and rules which are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that is not in compliance therewith. He shall keep and maintain a permanent register of all notices and rules filed, including superseded and repealed rules, which shall be open to public inspection and shall provide copies of any notice or rule upon request of any person. Unless otherwise provided by statute, the secretary of state may require the payment of the cost of providing such copies.

(3) In the event that the administrative code committee has conducted a poll of the legislature in accordance with 2-4-403 or the revenue oversight committee has conducted a poll in accordance with 5-18-109, the results of the poll shall be published with the rule.

(4) Each rule shall become effective after publication in the register as provided in 2-4-312, except that:

(a) if a later date is required by statute or specified in the rule, the later date shall be the effective date;

(b) subject to applicable constitutional or statutory provisions, an emergency rule shall become effective immediately upon filing with the secretary of state or at a stated date following publication in the register if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to every person who may be affected by them.

In Sec. 5, Ch. 2, Ex. L. 1971; amd. Sec. 10, Ch. 285, L. 1977; amd. Sec. 2, Ch. 561, L. 1977; Sec. 82-4204(part) and Sec. 7, Ch. 243, L. 1979; amd. Sec. 12, Ch. 268, L. 1979.

SECTION 3-201. [Administrative Rules Review Committee Review of Rules.]

(a) The [administrative rules review committee] shall selectively review possible, proposed, or adopted rules, and prescribe appropriate committee procedures for that purpose. The committee may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules, and hold public proceedings thereon.

(b) Committee meetings must be open to the public. Subject to procedures established by the committee, persons may present oral argument, data, or views at those meetings. The committee may require a representative of an agency whose possible, proposed, or adopted rule is under examination to attend a committee meeting and answer relevant questions. The committee may also communicate to the agency its comments on any possible or proposed rule, and require the agency to respond thereto in writing. Unless impracticable, in advance of each committee meeting notice of the time and place of the meeting and the specific subject matter to be considered must be published in the [administrative bulletin].

(c) The committee may recommend enactment of a statute to improve the operation of one or more agencies. The committee may also recommend that a particular rule be superseded in whole or in part by statute. The [speaker of the house and the president of the senate] shall refer those recommendations to the appropriate standing committees. This subsection does not preclude any committee of the legislature from reviewing a rule on its own motion or recommending that it be superseded in whole or in part by statute.

[(d) (1) If the committee objects to all or some portion of a rule because the committee deems it to be beyond the procedural or substantive authority delegated to the adopting agency, the committee may file that objection in the office of the [secretary of state]. The filed objection must contain a concise statement of the committee's reason for its action.



(2) The [secretary of state] shall affix to each objection a certification of the time and date of its filing and as soon thereafter as possible shall transmit a certified copy thereof to the agency issuing the rule in question, the [administrative rules editor, and the administrative rules counsel]. The [secretary of state] shall also maintain a permanent register open to public inspection of all committee objections.

(3) The [administrative rules editor] shall publish and index an objection filed pursuant to this subsection in the next issue of the [administrative bulletin] and indicate its existence adjacent to the rule in question when that rule is published in the [administrative code]. In case of a filed committee objection to a rule subject to the requirements of Section 2-101(g), the agency shall indicate the existence of that objection adjacent to the rule in the official compilation referred to in that subsection.

(4) Within [14] days after the filing of a committee objection to a rule, the issuing agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

[(5) After the filing of a committee objection that is not subsequently withdrawn, the burden is upon the agency in any action for judicial review or for enforcement of the rule to establish that the whole or portion thereof objected to is within the procedural and substantive authority delegated to the agency.]

(6) The failure of the [administrative rules review committee] to object to a rule is not an implied legislative authorization of its substantive or procedural lawfulness.]

(e) The committee may recommend to an agency that it adopt a rule. [The committee may also require an agency to publish notice of a committee recommendation as a proposed rule of the agency and to allow public participation thereon,

56. according to the provisions of Sections 3-105 through 3-104. After those pro-  
 57. ceedings, however, an agency is not required to adopt such a proposed rule.]

58. (f) The committee shall file an annual report with the [presiding officer]  
 59. of each house and the governor.

#### COMMENTS

Subsection (a) and (b) are a combination of modified Iowa Act, Section 17A.8(6) and Nebraska Act, Sections 84-908 and 84-908.01.

Subsection (c) is an extended and substantially modified Iowa Act, Section 17A.8(8). Most importantly, it provides that a lawful rule may only be legislatively overcome or altered by statute. That is, legislative suspension or repeal of a particular agency rule, in whole or in part, should ultimately be determined only by joint legislative action subject to the veto of the governor of the state or the overriding of a veto.

In many states a one house or two house veto or suspension of a particular agency rule, or a legislative committee veto or suspension of a particular agency rule, may raise serious state constitutional questions. See e.g. Taylor, "Legislative Vetoes and the Massachusetts Separation of Powers Doctrine," 13 Suffolk L. Rev. 1 (1979) and State of Alaska v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

There are three principal arguments for the unconstitutionality under many state constitutions of a legislative veto or suspension mechanism by means other than statute. First, it would improperly impinge upon the governor's veto power. Second, it consists of legislation by an unconstitutional means. Third, it empowers a part of the legislative branch to perform an executive function. In addition, when such a veto or suspension authority is vested in a legislative committee or only one house of the legislature it is alleged to be an undue delegation of legislative power. Despite these arguments, a number of states have enacted statutes authorizing legislative vetoes or suspensions of administrative rules by means other than statute. See National Conference of State Legislatures, Restoring the Balance: Legislative Review of Administrative Regulations 31-44 (1979). A few states have even expressly done so in their constitutions, thereby avoiding any possible constitutional issue. See e.g. Michigan Constit. Art. IV, Section 37 and South Dakota Constit. Art. III, Section 30.

Even if there are no constitutional impediments in a particular state to the use of a one house or two house veto or suspension of a particular agency rule, or a legislative committee veto or suspension of a particular agency rule, they are still undesirable. On the policy reasons against the use of such devices see generally Bruff and Cellhorn, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes," 90 Harv. L. Rev. 1369 (1977). There are many reasons why legislative vetoes or suspensions of administrative rules by means other than statute should be avoided. In the first place, schemes of this sort aggrandize the legislature's authority at the expense of the executive branch's countervailing independence. By cutting out the veto power of the governor present in the usual legislative process, such mechanisms weaken the state chief executive's bargaining power with the legislature and disable him from checking unsound legislative action. They also facilitate over-involvement of the legislative branch in the day-to-day administration of programs it

by statute and induce an unhealthy split in perceived authority over administrative matters.

Furthermore, a legislative mechanism for veto or suspension of state agency rules will be useful primarily as a check against unwise rules that are otherwise clearly lawful. For an effective check against most unlawful rules is provided by judicial review, particularly if it is coupled with the reversed burden of persuasion that accompanies the legislative committee objection mechanism proposed in subsection (d) of this section. Therefore, legislative veto or suspension of particular state agency rules will have its primary practical impact on lawful rules and, in effect, would constitute a pro tanto narrowing of the authorizing legislation under which they were otherwise properly issued. Such a narrowing of the authorizing legislation should be executed in the same manner as the legislation was initially adopted. Otherwise, a committee, one house, or two houses of the state legislature, would continually be in a position to subvert proper authorizing action of a more representative and authoritative lawmaking process with built-in checks and balances. A part of the usual statute-making process should not be able to nullify action of the more representative and more authoritative whole, with its built-in checks and balances, lest the very virtues of the whole process be lost. Therefore, all efforts to nullify otherwise lawful agency rules should be executed by joint legislative action, subject to the veto of the governor.

In addition, legislative committee veto or suspension of rules, or one house or two house veto or suspension of rules, may be more susceptible to undue influence by special interest groups acting contrary to the public interest than is veto or suspension by the usual legislative process of statutory enactment. This is another policy reason against veto or suspension of state agency rules by any means other than joint legislative action submitted to the governor. It should also be noted that in some cases the existence of a legislative mechanism to veto or suspend rules by a means that is easier to invoke than the usual statute-making process may have the following undesirable consequence. That mechanism may encourage people to reduce their participation in the rule-making proceeding before the agency and, instead, concentrate their efforts on the alternative legislative veto or suspension mechanism.

If a legislature wishes to vest its administrative rules review committee with more than purely recommendatory authority, it should enact bracketed subsection (d). Subsection (d) is a substantially modified Iowa Act, Section 17A.4(4)(a)-(b). This provision provides an effective legislative check, by means less than statute, on unlawful agency rules. It authorizes a legislative committee to file a formal objection to a rule on the ground that it is procedurally or substantively unlawful. That objection would detail the precise reasons why the committee believes the rule to be unlawful. Notice that such an objection has been filed would be printed adjacent to the rule wherever it is published, and the objection itself would be made available for public inspection. The formal committee objection would then shift to the particular agency the burden of establishing that the rule is procedurally and substantively lawful in any subsequent proceeding for judicial review or for enforcement of the rule. If the agency fails to meet its unusual burden of persuasion in that case, the court would invalidate the entire rule, or the relevant portion thereof.

The filing of a formal objection to a rule by the appropriate legislative committee will place the adopting agency in a dilemma. The agency can rely upon the rule as it is, thereby accepting this special burden of demonstrating

that the rule is wholly lawful in a future court case, or the agency can change the rule in order to reinstate the usual presumption of validity that attaches to an agency rule. The extent to which an agency will be amenable to modifying the rule to eliminate any objection of the committee will obviously depend upon the extent to which the agency thinks it needs the challenged rule in its original form, and the agency's confidence that it can overcome its special burden of persuading the court that the rule in that form is lawful in all respects. If the rule's validity is doubtful because it is not clearly procedurally and substantively lawful, the agency will usually modify the rule: for the reversed burden of persuasion will result in the invalidation of many rules of doubtful legality when they are challenged in court. Of course, the legislative committee's objection authority would not interfere with the operation or effectiveness of clearly valid agency rules. The committee is only authorized to alter one aspect of the procedure by which the legality of the rule will be finally determined by the courts.

As a consequence, a legislative committee with authority to object to agency rules in the manner described in subsection (d) will be a credible check on illegal agency rule making. The committee-objection mechanism proposed here may be justified, therefore, on the ground that its mere existence is likely to make agencies act more responsibly in exercising their rule-making powers; for they will know that the shift in the burden of persuasion after a committee objection will, in close cases, make judicial invalidation of the rule much more likely than at present. Actual exercise of its objection authority by a legislative committee will also have the added benefit of inducing agencies which have issued rules of doubtful or clear illegality to withdraw them, thereby sparing the public the cost of complying with those rules or contesting them in the courts. Finally, it seems desirable to provide a means by which members of the public who are aggrieved by allegedly illegal agency rules can, in those cases where their claims are especially credible, be aided in their efforts to secure a judicial invalidation of those rules. A good way to separate the credible claims deserving such help from those that do not is by securing an evaluation of the legality of the rules in question by an independent responsible body external to the agency. And a good way to aid such aggrieved persons whenever that independent evaluation agrees with their contention is to shift the burden of persuasion in any subsequent judicial proceeding involving the validity of those rules from the assailant, who had to convince the court they were unlawful, to the agency, which is then required to convince the court that they are lawful.

It is also logical to shift to the agency the burden of demonstrating the validity of a rule in subsequent litigation when a more politically accountable and independent body objects thereto. Unlike the agency, the legislative committee members are directly accountable to the public and represent the body that created the agency and invested it with whatever authority the agency may lawfully exercise. The usual presumption of validity accorded an agency rule, therefore, may reasonably be deemed inappropriate when a legislative committee believes the rule to be unlawful. Furthermore, legislatures have always been assumed to have the authority, which they have often exercised, to allocate the burden of persuasion in court litigation, so long as they act "reasonably" when they do so. And a shift in the burden of persuasion as to the validity of a particular rule in these circumstances certainly seems "reasonable." Note also that there is a clear standard against which the committee is to operate when it objects: "beyond the procedural or substantive authority delegated to the adopting agency." And the committee must include the specific reasons for its

action in the objection so that courts and others who wish to examine the specific grounds supporting an objection may easily do so.

In addition, it should be noted that the reversed burden-of-persuasion mechanism is a fair compromise between the extremes of authorizing one house of the legislature or a legislative committee to veto, temporarily or permanently, rules issued by an agency, and authorizing a legislative committee merely to recommend to the legislature that it overrule such regulations by statute. The undesirability of such a one house or a committee veto was discussed above.

Of course, as paragraph (6) of subsection (d) states, the failure of the appropriate legislative committee to file a formal objection to a rule should not be construed by a reviewing court as an implied legislative authorization of the rule. Time constraints will often prevent the appropriate committee from carefully reviewing all agency rules; and an affected party may decide to seek judicial relief directly rather than a legislative committee objection. Therefore, it would be unfair to imply negatively legislative authorization for any rule merely because no objection to it had been filed by the committee.

Currently, only Iowa and Montana provide for a scheme whereby the burden of persuasion as to the validity of a rule is reversed after an objection has been filed to the rule by a legislative committee. See Iowa Act, Section 4(4), and Montana Act, Section 2-4-506(3). The constitutionality of that scheme has been upheld in Iowa. In doing so, the Iowa Supreme Court voided certain agency rules solely because the agency, after those rules were formally objected to as unlawful by the appropriate legislative committee, could not meet its burden of persuading the court that they were lawful in all respects. The court intimated that if the objection had not been filed it might have held the rules valid. See Schmitt v. Iowa Dept. of Social Services, 263 N.W.2d 739 (Iowa 1978). In another Iowa case, the court upheld an agency rule after an objection to it had been filed by the appropriate legislative committee, because the agency successfully met its burden and persuaded the court that the rule was lawful. Iowa Auto Dealers Ass'n v. Iowa Dept. Revenue, N.W.2d (1981).

See Bonfield, IAPA at 905-924, for a discussion of the desirability and operation of this reversed burden-of-persuasion mechanism after an authorized legislative committee formally objects to a rule.

Though not provided for in the text of subsection (d), a state enacting it might also consider adding a provision providing as follows. Whenever a rule is invalidated because an agency fails to meet its legislative committee imposed special burden of persuasion under subsection (d)(5), judgment shall also be rendered against the agency for court costs, including a reasonable attorney's fee. Reimbursement of this sort would encourage aggrieved persons to litigate the validity of rules that are tainted by a formal, legislative committee objection, and would thus remove one obstacle -- financial expense -- that discourages persons from seeking judicial review of unlawful agency rules. The Iowa Act has such a provision in its Section 4(4). If it is desired to add a provision of this type to Section 3-204(d)(5) it might be added at the very end and provide:

and render judgment against the agency for court costs.  
Court costs include a reasonable attorney's fee and are payable by the [state comptroller] from the support appropriations of the agency that adopted the rule.

TESTIMONY OF JON A. MEREDITH, ADMINISTRATOR,  
DEPARTMENT OF REVENUE, LEGAL & ENFORCEMENT DIVISION  
ON HOUSE BILL #92

An Act To Authorize The Administrative Code Committee To Object To Any Rule Upon The Ground That It Was Adopted In Substantial Violation Of The Procedural Or Substantive Authority Delegated To The Agency; Requiring The Agency, After Objection By The Committee, To Prove The Lawfulness Of The Rule; Awarding Costs And Attorney Fees Against The Agency If The Rule Is Invalidated By Court Judgment; Amending Section 2-4-506, MCA, before the Senate State Administration Committee on 3/1/83.

While the Administrative Code Committee may indeed need a method to object to the way in which a rule has been adopted HB #92 is a poor way to achieve it. This primarily is due to the fact the bill does not set forth any objective standards by which the term "substantial compliance" (found in subsection (1) of section one of this bill) may be construed. Thus, just because the ACC may object to the procedural validity of rules and then publish its objections to the rules in the Montana Administrative Register or the ARM, agencies could face a proliferation of litigation.

It is our opinion passing this bill without adequately defining what constitutes "substantial compliance" would not only precipitate litigation but create the potential for abuse of the rulemaking process.

JAM/ilb

STATE ADMINISTRATION  
March 2, 1983  
Page 7

SENATOR TOWE remarked that many non-profit organizations are donated time, such as the Search and Rescue.

ACTION ON H.B.557:

SENATOR TOWE MOVED TO AMEND H.B.557 BY STRIKING SECTION 29 and include the title.

MOTION PASSED.

SENATOR TOWE MOVED THAT H.B. BE CONCURRED IN AS AMENDED.

MOTION PASSED. Senator Towe will carry this bill.

ACTION ON H.B.173:

SENATOR HAMMOND MOVED S.B.173 BE CONCURRED IN.

MOTION PASSED. Senator Story will carry this bill.

ACTION ON H.B.36:

SENATOR HAMMOND MOVED H.B.36 BE CONCURRED IN.

MOTION PASSED.

ACTION ON H.B.37: Held

Discussion was held on this bill.

SENATOR MARBUT presented his amendments.

SENATOR STORY asked that this bill be held until Friday and that Senator Marbut present his amendments at that time.

ACTION ON H.B.47:

SENATOR TOWE presented amendments shown as EXHIBIT 10.

SENATOR TOWE MOVED THE AMENDMENTS.

MOTION PASSED.

SENATOR TOWE MOVED H.B.47 BE CONCURRED IN AS AMENDED.

MOTION PASSED. Senator Towe will carry this bill.

ACTION ON H.B.92:

SENATOR TOWE MOVED AMENDMENT TO SUBSECTION 2.

MOTION PASSED

SENATOR TOWE MOVED THE AMENDMENT ON PAGE 2, LINE 9 thru 12.

MOTION PASSED. Senators Hammond and Marbut voting "NO".

SENATOR TOWE MOVED AMENDING PAGE 2, LINE 9 & 10.

MOTION PASSED. Senators Hammond and Marbut voting "NO".

SENATOR TOWE MOVED LINE 20 PAGE 2 CHANGING "shall" to "may".

MOTION PASSED.

SENATOR TOWE MOVED H.B.92 BE CONCURRED IN AS AMENDED. EXHIBIT 11.  
MOTION PASSED.

## ROLL CALL

STATE ADMINISTRATION

COMMITTEE

47th LEGISLATIVE SESSION -- 1983

Date 3/2/83

[illegible]

Each day attach to my collection



# STANDING COMMITTEE REPORT

MARCH 2 19 83

MR. PRESIDENT

## STATE ADMINISTRATION

We, your committee on

HOUSE 92  
having had under consideration Bill No.

Stobie (Hammond)

HOUSE 92  
Respectfully report as follows: That Bill No.

third reading, be amended as follows:

1. Title, line 10.  
Strike: "AWARDING"  
Insert: "ALLOWING"
2. Page 2, line 9.  
Following: "to the rule"  
Insert: ", provided an agency response must also  
be published if requested by the agency"
3. Page 2, line 10.  
Following: "objection"  
Insert: "and the agency response"
4. Page 2, line 20.  
Strike: "shall"  
Insert: "may"

XXXXXX  
DO PASS

continued...

5. Page 3, line 5.  
Strike: "not"
6. Page 3, line 9.  
Following: "intent"  
Insert: "with an arbitrary or capricious disregard for  
the purpose of the authorizing statute as evidenced by  
documented legislative intent, or was not"

And, as amended  
BE CONCURRED IN